

Chapter 1

GLOBALIZATION AND ITS IMPLICATIONS FOR ANTITRUST COOPERATION AND ENFORCEMENT

In the last several decades, more and more nations have come to recognize the value of competition as a tool for spurring innovation, economic growth, and the economic well-being of countries around the world. National industrial policies and other government interventions that constrain or order competition within markets have not wholly disappeared but are far less evident than they were even a decade ago.

This new era is being defined by economic liberalization around the world and by dynamic technological change that not only is made possible by liberalization, but is itself an engine for liberalization. Both of these phenomena -- economic liberalization and technological development -- are in turn driving economic integration. This changing environment has many positive aspects. It promises more wealth for the world, including the less developed world, and more economic opportunity based on merit. But the changes can also be threatening and frightening.

Competition policy can help to facilitate economic liberalization. If working properly, competition policy can produce more goods and services from scarce resources and provide a set of rules and disciplines that are not based on privilege and that are conducive to and responsive to efficient marketplace behavior. A century ago, only the United States had comprehensive antitrust laws in place. With the reconstruction following World War II, a number of jurisdictions in Western Europe, as well as Japan and some Latin American regimes developed competition or antitrust laws in some form. Today, more than 80 countries have antitrust laws, approximately 60 percent of which were introduced in the 1990s.¹

Most nations have enacted competition laws as a way to actualize (as well as to symbolize) a degree of commitment to the competitive process and to the prevention of abusive business practices. The European Union (EU) has used competition policy as an instrument to foster economic integration. The introduction of competition laws and policies has also gone hand in hand with economic deregulation, regulatory reform, and the end of command and control economies.

Yet, the emergence of competition policy regimes has not meant a uniformity of substantive rules or institutional approaches around the world. Competition policies of nations differ within a range that is

¹ Another 20 or more countries are in the process of drafting laws. Moreover, those countries with competition laws accounted for nearly 80 percent of world output and 86 percent of world trade. See Mark R.A. Palim, *The Worldwide Growth of Competition Law: an Empirical Analysis*, XLIII ANTITRUST BULL. 105, 109.

in keeping with differences in legal systems. Moreover, even within established antitrust jurisdictions such as the United States, antitrust law evolves and changes. Technological development, the drive for competitiveness in the world environment, and economic analysis all contribute to changes in competition policy.

THE MANDATE OF THE INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE

What new tools, tasks, and concepts will be needed to address the competition issues that are just emerging on the horizon of the global economy? To answer this question and to guide policymaking in the medium term, Attorney General Janet Reno and Assistant Attorney General for Antitrust Joel I. Klein, in November 1997, formed the International Competition Policy Advisory Committee (the “Advisory Committee” or “ICPAC”) -- the first such body formed by the U.S. Department of Justice on international antitrust matters. The Advisory Committee was asked to give particular attention to three topics: multijurisdictional merger review; future directions in enforcement cooperation between U.S. antitrust authorities and their counterparts around the world, particularly in their anticartel prosecution efforts; and the interface of trade and competition issues. The reasons for these points of focus are clear. The large number of mergers being reviewed by a multitude of competition authorities, the significant increase in the number of international cartel cases being prosecuted by the Antitrust Division, and the international controversy over barriers to market access stemming from allegedly anticompetitive private barriers to trade have come to make these international matters of mainstream significance to U.S. antitrust policy.

Over the course of two years, the Advisory Committee held extensive public hearings in Washington with the participation of scholars, business executives, economists, lawyers, and competition officials from around the world.² Additionally, the Advisory Committee undertook an extensive outreach effort, received numerous submissions, and actively debated not only the three key topics identified above but additional matters that the Advisory Committee considered likely to be important to international antitrust in the next century.³ At the same time, some issues were consciously excluded from the Advisory Committee’s work. For example, the Advisory Committee did not review unfair domestic trade remedies, such as antidumping measures. In addition, the Advisory Committee did not address a variety of practices that may be reprehensible, illegal, or offensive under U.S. or foreign law or policy that can affect the nature of competition within a market or internationally. These include matters such as substandard wage and employment standards, the use of child labor, and lax environmental regulations, among others.

The Advisory Committee has tried to identify initiatives that the U.S. Department of Justice and the U.S. government could undertake over the short and medium term and that would contribute to achieving the integration of markets through:

² See Annex 1-B.

³ The transcripts of Advisory Committee meetings and hearings, outreach questionnaires, and request for papers are all available at the Advisory Committee’s website at <<http://www.usdoj.gov/atr/icpac/icpac.htm>>.

- C *Increased transparency and accountability of government actions*, including those of the U.S. government as well as other jurisdictions, and a more nearly shared view by such authorities of what constitutes best practices in the field of competition policy and its enforcement;
- C *Expanded and deeper cooperation* between U.S. and overseas competition enforcement authorities, and between trade authorities and competition enforcement authorities, to ensure that domestic and international structures are in place for deepening international approaches to shared problems and managing tensions that might arise; and
- C *Greater soft harmonization and convergence of systems* with the aims of limiting actions by governments and firms that stifle competition and produce negative spillover effects abroad, reducing unnecessary transaction costs for firms, and increasing efficiency of effort and outcome for governments and consumers.

These approaches are explained and amplified in the chapters that follow.

For Members and staff of the Advisory Committee, an exciting aspect of the study has been the opportunity to enrich perspectives about the consequences of economic globalization for competition policy in the years ahead. We first share below our assessment of the challenges posed for international antitrust policies by the international economy.⁴

THE GLOBAL ECONOMY AND COMPETITION POLICY

In considering competition policy and the international marketplace, a key challenge stems from the disjunction between national laws and international markets. In other words, law is national but markets

⁴ There is no single or even established methodology for evaluating the importance of the international economy and international competition problems on the U.S. or other national economies. As a general matter, neither the Antitrust Division of the U.S. Department of Justice nor the U.S. Federal Trade Commission even routinely keep data on the basis of domestic versus international matters. This overall lack of data reflects, in part, what can be the absence of a unique or defining character of a transaction that is international. It also reflects the U.S. government's longstanding policy that U.S. antitrust authorities "do not discriminate in the enforcement of the antitrust laws on the basis of the nationality of the parties. Nor do [they] employ their statutory authority to further non-antitrust goals." U.S. DEPARTMENT OF JUSTICE/FEDERAL TRADE COMMISSION, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS 2 (1995) *reprinted in* 4 TRADE REG. REP. (CCH) ¶13,107 (1995). That policy of neutrality and nondiscrimination is a critical and admirable feature of the U.S. system. The sparsity of data collected to illustrate the extent to which the U.S. antitrust agenda is now "international" is a problem that should be amenable to correction without harming those critical principles. The Antitrust Division recently began tracking the number of transactions it reviews with "an international aspect," as discussed further in Chapter 2. The U.S. Federal Trade Commission maintains statistics on the number of Hart-Scott-Rodino filings received from foreign parties. *See* Annex 2-B. Similarly, the Antitrust Division's Executive Office developed a definition for identifying "international matters" that it has used since 1997 for data collection of criminal antitrust matters, among others, associated with Antitrust Division performance measurements, as described further in Chapter 4.

can extend beyond national boundaries. This obliges us to ask: If markets are broader than national boundaries, are national laws and their enforcement sufficient to deal with the market problems of the new century? To avoid the difficulties that would inevitably attend the development of any supranational law (such as a new international bureaucracy, loss of democratic participation, or loss of local choice), is it possible to rely upon national law, yet at the same time work toward the development of a more seamless international system that facilitates the workings of global markets? The United States and indeed the international community are well on the way to solving some of the challenges raised by this central problem, but less advanced in addressing others. Let us consider both dimensions.

Of all these challenges, the international community has made the most headway in increasing cooperation and networking among the competition agencies of the world. International cartel enforcement and other forms of international enforcement cooperation in merger review are notable areas of success, particularly in recent years. These cooperative efforts are a welcome change from the early years of the postwar period, when U.S. attempts to apply its antitrust laws to address offshore practices seen as harming the U.S. economy led to instances of sharp conflict with other sovereigns. Today, there is far less conflict between jurisdictions, and in the last decade there have been few, if any, instances of countries invoking statutes such as blocking and clawback laws to impede the United States in its efforts to prosecute transnational antitrust cases.

Furthermore, both the number of bilateral antitrust cooperation agreements between the United States and other jurisdictions and the number of new international initiatives have increased markedly in recent years. Bilateral antitrust cooperation agreements are instruments that the United States and other jurisdictions use to expand ties with one another and to improve opportunities for cooperation and coordination in antitrust enforcement matters. Formal and informal bilateral arrangements have helped to introduce, deepen, and regularize the structure of the enforcement cooperation that now occurs, while the contents of the agreements have gone through several generations.⁵ The United States is currently a party to bilateral antitrust cooperation arrangements with seven jurisdictions: Australia, Brazil, Canada, the European Union, Germany, Israel, and Japan. It is also a party to several multilateral arrangements made under the auspices of the Organization for Economic Cooperation and Development (OECD) and the North American Free Trade Agreement. Each bilateral agreement reflects two themes -- enforcement cooperation, on the one hand, and the avoidance or management of disputes, on the other. In 1999 the United States entered into its first bilateral antitrust agreement designed specifically to permit the exchange of confidential information: an agreement with Australia negotiated in keeping with the International Antitrust Enforcement Assistance Act of 1994.

An important milestone in international cooperation was the 1998 supplement to an earlier U.S. agreement with the European Commission, which enhances the provisions governing positive comity. As

⁵ Annex 1-C hereto describes the international antitrust cooperation agreements to which the United States is a party as well as those regional initiatives where it has been an active participant.

discussed in some detail in Chapter 5, positive comity presents a means whereby the jurisdiction most closely associated with the alleged anticompetitive conduct assumes primary responsibility for the investigation and possible remedy. Positive comity holds the potential to obviate the need for extraterritorial enforcement if the requested party can resolve or remedy the anticompetitive activities.

These cooperative solutions hold great potential, but, of course, it is predictably the case that they work effectively only when the cooperating agencies are jointly sympathetic to an approach regarding the particular enforcement matter. When interests or perspectives diverge, cooperation is less useful.

A second challenge is now being observed: laws of some 60 nations, and the number is growing, require (or provide for) antitrust merger notification, waiting periods, substantive review, and formal clearance of a transaction. The growing tendency of nations to apply their laws to offshore mergers and the sheer volume of law that now must be considered by firms undertaking mergers are not necessarily positive developments. Questions arise whether the overlapping regulations are excessive, and whether the system can be usefully rationalized yet still ensure that enforcers have the tools necessary to identify and remedy anticompetitive transactions.

A third challenge is linked to the world trading system itself and the promise of open markets: Nations may promise open markets as far as the state is concerned and undertake substantial liberalization commitments with respect to governmental practices, but at the same time allow, by action or inaction, blockage of their markets by firms' anticompetitive restraints. If there is an international interest in removing those restraints and thus freeing up the world markets, can this interest be fully satisfied by national antitrust law? Is a new approach needed that does not split the state role from the private role and that does not test the limits of national jurisdiction?

Sound competition policy recognizes that markets without artificial borders introduced by governments and without distortions caused by anticompetitive business arrangements benefit from the application of principles such as national treatment, nondiscrimination, and transparency. These are, of course, among the core rules of the World Trade Organization (WTO) and its predecessor, the General Agreement on Tariffs and Trade (GATT). In part, for this reason, the issue of competition policy and its relationship to trade and potential for treatment under international trade rules has become a subject of intensive consideration at the WTO and elsewhere.

There are still other challenges. How can nationalistic incentives and action, such as national champion or beggar-thy-neighbor policies, be limited? Can the costs of divergent sets of laws be eliminated without undermining national choices made in particularized contexts? Would rules or understandings that tend to limit and channel antitrust disputes be worthwhile? What assistance can help developing countries to strengthen their markets and participate more fully in the world trading system by anchoring their markets with competition laws appropriate to their systems, and will that thereby help improve the world competition system?

The Advisory Committee's mandate specifically includes the first three problems, which are addressed in Chapters 2 to 5. Moreover, this Advisory Committee has interpreted its mandate to include the panoply of issues that are world competition issues. Indeed, the Advisory Committee was asked to think broadly and boldly about what new tools, tasks, and concepts will be needed to address emerging international competition issues. Thus, this Report considers problems that transcend nations, problems within individual nations, and problems between particular systems.

The diversity of approaches to competition policy combined with a growing recognition of the positive role for competition suggest to this Advisory Committee that there is value in seeking a degree of harmonization of systems. This Report discusses the potential for such soft convergence efforts in a variety of forums and identifies some specific steps to further that objective. This effort will require even greater engagement by U.S. officials in discussion and cooperation with their counterparts. The Advisory Committee views such activities as an important and necessary addition to the traditional enforcement activities undertaken by U.S. antitrust agencies.

The Advisory Committee has considered the role for competition policy in the global economy broadly and with a view to improving approaches not only within the United States but also around the world. It is not possible to predict how the global economy will evolve, but this Report starts from the premise that the United States should try to provide an environment conducive to the further expansion of international commerce, tolerant of the diversity of nations with respect to their own evolving law, and hospitable to the enhancement of world welfare.

STRUCTURE OF THE REPORT

Turning now to the specific discussions that follow, this Report begins with a review of the problems and challenges resulting from the growth of merger control laws around the world. Chapter 2 considers the scope for substantive harmonization between systems and outlines several specific steps that U.S. authorities might take over the medium term to forge even closer ties with other authorities around the world, improve transparency and manage frictions. This chapter also considers steps likely to promote a degree of convergence among nations.

Chapter 3 considers policy approaches that could be undertaken within the United States and between jurisdictions to reduce transaction costs that may arise when mergers are reviewed in multiple jurisdictions. This chapter identifies several due process and procedural principles designed to ensure that merger control efforts focus on those transactions that raise competition concerns within a reviewing jurisdiction and refrain from unduly burdening transactions, particularly those that lack anticompetitive potential. The discussion does not, however, advocate any single approach for all systems.

In Chapter 4 the Report examines international anticartel enforcement and the role of cross-border enforcement cooperation in that process. The number of U.S. antitrust cases filed against international cartels has increased dramatically in recent years, and those cases show that international cartels impose

serious costs on the U.S. economy as well as on economies around the world. Most, if not all, jurisdictions with competition laws in place prohibit cartels. And most of the U.S. bilateral antitrust cooperation agreements are designed to facilitate cooperation in enforcement actions against cartels. This chapter examines the recent U.S. record of enforcement action against international cartels and considers what additional steps might be undertaken to increase business awareness of the problem and to enhance cooperation between competition authorities still further.

In Chapter 5 the Report considers areas where trade and competition policy concerns can intersect, most notably with respect to anticompetitive practices in foreign markets that are seen as inhibiting export commerce or blocking access to those markets. This is a subject that has animated trade tensions between nations, triggering intensive discussion at a variety of international forums, most recently at the November 1999 WTO talks in Seattle. This chapter examines the policy options available to the United States and other nations to address problems that are perceived to arise from some combination of private and governmental restraints on trade. It considers the scope for expanding bilateral cooperation, including the use of positive comity; the utility of U.S. extraterritorial enforcement actions; and the potential for international initiatives on market access problems that might be taken at the WTO, the OECD, and other international forums. While the WTO clearly has an important role to play, the Advisory Committee sees the global competition policy agenda as a broad one, the full range of which does not find its natural home at the WTO.

In Chapter 6 this Report considers the global competition problems that require expanded international initiatives by the United States and other nations. New initiatives, supported by existing institutions, may be in order. Hence, this last chapter considers steps that the United States could undertake domestically to ensure that its institutional structures and approaches to the making of foreign economic policy are configured to respond to the challenges of the global economy. The chapter also considers an expanded set of policy initiatives that the United States could usefully undertake multilaterally. This discussion recognizes that the global economy is also creating new challenges to competition policy at home and abroad and that it is therefore necessary to consider the applicability of competition law and policy to emerging or evolving fields such as electronic commerce. Through an examination of U.S. policy from these different perspectives, the Report aims to ensure that the United States continues to lead by example and to engage constructively with competition policy regimes around the world.⁶

⁶ A Separate Statement by Advisory Committee Member Eleanor M. Fox can be found at Annex 1-A.